IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1374 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRAMJIBHAI RUPABHAI CHALSANIYA - Appellant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR YOGESH S LAKHANI for Appellant
MR KT DAVE ADDL. PUBLIC PROSECUTOR for Respondent

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 06/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. By filing instant appeal under Section 374 of the Code of Criminal Procedure ('the Code' for short, the appellant ('the accused' for short) challenges the correctness of the judgment and order dated 7.12.1999 rendered in Sessions Case No.143 of 1994 by the learned Additional Sessions Judge, Rajkot District, Rajkot.

By the impugned judgment and order, the accused who was charged for commission of the offences punishable under Sections 376, 366 and 506 of the Indian Penal Code ('IPC' for short), on the accusation that on 17.9.1993 he took the prosecutrix, Dinaben Mansukhbhai Parmar, at Shreyas Guest House and after giving some stupefying substance in the snacks, ravished her and thereafter again on 24.9.1993 at 2 P.M., he committed rape on her in her house, was held guilty for the same and, therefore, he was convicted for the offence punishable under Section 376 (2) IPC and sentenced to suffer R.I.

for ten years and fine of Rs.1,000/- and in default of payment of fine, S.I. for a further period of one month.

2. The brief facts of the prosecution case, as disclosed from the complaint lodged by the prosecutrix, Dinaben, and unfolded during trial, are as under:

2.1. The prosecutrix, Dinaben Mansukhbhai Parmar, was residing at Rajkot since last twenty years. Her husband, Mansukhbhai alias Babu, met with an accident. A complaint was lodged against Dinaben by her husband. The accused, being a police constable, was investigating the said case. The accused prepared a plan to take disadvantage of the situation and threatened the prosecutrix. She was under the control of the accused and the accused kidnapped and compelled her to go with him at various places. She was given intoxicating medicines by the accused. She was raped right from the year 1991. It was

further case of the prosecution that the accused misused his official position and spoiled the life of the prosecutrix. The accused is married and is having children. In spite of this fact, he took disadvantage of the situation and he used to threaten the prosecutrix and threat was given to the extent that the accused will disclose the illicit relation they had to her husband which will result into break down of her matrimonial life. It was further case of the prosecution that under threat the prosecutrix was taken to different places. Some drops of intoxicating drugs were added in the soft drinks or in the food given to the prosecutrix by the accused and though there was no consent from her, the accused took the benefit of the situation as she was having no control mentally and committed sexual intercourse with her. Once her husband suspected him and hence she asked her husband as to what was with the accused which compels her to follow him. Medical advise was sought for and it was found that some exciting intoxicant drugs

were given to the prosecutrix. The accused used to come between 3.00 and 5.00 P.M. when her husband presumed to be out of the house. It was further case of the prosecution that once the accused had taken her to a guest house at Rajkot and he added some medicine in the 'pav-bhaji' and thereafter enjoyed sexual intercourse with her. It is further case of the prosecution that the accused tried to obtain certain writings from the prosecutrix so as to establish his innocence. Some chits were also taken by the accused. It was also the case of the prosecution that the prosecutrix was not in a position to reside at Rajkot.

2.2. The prosecutrix approached some advocate and lodged a written complaint before the learned Chief Judicial Magistrate, Rajkot and the learned Chief Judicial Magistrate, Rajkot was pleased to direct the D.C.B. Police Inspector to investigate into the complaint under Section 156 (3) of Code.

2.3. On receipt of the complaint from the Court, P.W.7, B.A. Tivari, started investigation. During the course of investigation, he recorded statements of the prosecutrix and other witnesses, capsules were recovered from the accused in presence of panchas, the accused was arrested, muddamal were forwarded to FSL for analysis and as per the report received from FSL, the capsules were containing an ayurvedic medicine 'prajna'. He also sent the prosecutrix for medial check up. On completion of the investigation, as incriminating evidence was found against the accused, he filed charge-sheet against the accused for commission of the offence punishable under Sections 376, 366 and 506 IPC in the Court of learned Chief Judicial Magistrate, Rajkot.

2.4. As the offence punishable under Section 376 IPC is exclusively triable by a Court of Sessions, the learned Chief Judicial Magistrate, Rajkot committed the case to the Court of

Sessions, Rajkot.

2.5. The learned Additional Sessions Judge, Rajkot to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under Sections 376, 366 and 596 IPC. The accused pleaded not guilty to the charge and claimed to be tried and, therefore, he was put to trial by the trial Court in Sessions Case No.143 of 1994.

2.6. In order to prove the charge against the accused, the prosecution has examined as many as seven witnesses and relied upon their oral testimonies, the details of which have been given in paragraph 4 of the impugned judgment and order. They are as under:

P.W. No.	Name	Ex. No	Page No
1	Dr.Pratimaben Trambaklal Nathvani, Medical Officer	8	24
2	Dr. Bharatbhai Pranshankar Dholakia	12	34

P.W. No.	Name	Ex. No	Page No
3	Chandravadan Prabhulal Dalal	14	36
4	Dinaben Babulal Raval	15	37
5	Mansukhbhai Lakhmanbhai	19	58
6	Indrajit Labhshankar Vyas	21	64
7	Balkeshwarprasad Avadhbihari Tivari	26	70

2.7. To prove the culpability of the accused, the prosecution has also produced a number of documents and relied upon the contents of the same, details of which have been given in paragraph 4 of the impugned judgment and order. They are as under:

Sr. No.	Description	Ex. No.	Page No.
1	Dinaben's medical case paper	10	28
2	Medical certificate pertaining to Dinaben's examination	11	33
3	Medical certificate pertaining to Premjibhai's medical examination	13	35
4	Letter alleged to have been written by complainant	16	49
5	So-called agreement between accused an prosecutrix	17	50
6	Panchnama as tor recovery of medicine	20	62

Sr. No.	Description	Ex. No.	Page No.
7	Extract from register maintained by Shreyas Guest House	22	65
8	Forwarding letter by investigating officer to FSL	27	72
9	FSL letter	28	74
10	FSL report	29	75
11	FSL report	30	76
12	FSL report	31	77
13	Letter by Police Inspector	32	81
14	Closing pursis	33	82

2.8. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement he denied the case of the prosecution in toto. He has reiterated that he has been falsely implicated in the case. However, he did not lead any evidence nor did he examine any witness to support his defence.

2.9. On appreciation, evaluation, analysis and analysis of the evidence on record, the trial court came to the conclusion that the accused was in a dominating position. He misused his position and obtained the consent of the victim, if at all it was consent, under duress that she will be harassed or put behind the bars in a case filed by her husband against her. So far as sexual intercourse the accused had with the prosecutrix is concerned, there is no doubt that he had sexual intercourse with her and the victim has categorically stated on oath that she was not a consenting party. On the basis of the aforesaid finding, the trial court came to the conclusion that the complicity of the accused for commission of offence under sections 376 (2) and 506 (2) IPC has been proved whereas offence under Section 366 IPC is not established. Resultantly, the trial court convicted the accused for commission of the offences under Sections 376 (2) and 506 (2) IPC and sentenced him to suffer RI for ten years and fine of Rs.1000/- i.d., S.I. for further period

of one month. But no separate sentence is imposed on the accused for commission of the offence under Section 506 (2) IPC, which has given rise to instant appeal at the instance of the accused.

3. Mr. Y.S. Lakhani, learned advocate for the accused, has taken us through the oral as well as documentary evidence on record and assailed the judgment and order of conviction and sentence recorded by the trial court by contending that the trial court has failed to appreciate the deposition of the prosecutrix and has come to a wrong conclusion. According to him, looking to the deposition of the prosecutrix, it is clear that she was a consenting party and with her will and wish the accused had sexual intercourse with her. It is also highlighted by him that the prosecutrix was keeping relation with the accused and she had gone with him willingly to various places. It is also pointed out by him that the story narrated by the

prosecutrix that the accused had committed sexual intercourse with her from the year 1991 till 1993 does not inspire confidence. It is also asserted by him that it has come in the evidence that the relations between both the families were cordial. The prosecutrix was treating the accused as her brother. Similarly, the wife of the accused was claiming the husband of the prosecutrix as her brother and thus they had relation of tying 'rakhi' on the festival of 'Rakshabandhan'. On the aforesaid premises, it is contended by him that the impugned judgment and order suffers from the vice of non-appreciation of evidence which is illegal, improper and contrary to the basic principles of criminal jurisprudence and also contrary to the evidence on record. Therefore, the impugned judgment and order deserves to be quashed and set aside by allowing the appeal and thereby acquitting the accused of the offences with which he was charged. He, therefore, urged to allow the appeal.

4. In support of the aforesaid submissions, Mr. Lakhani, learned advocate for the accused, has relied upon the following judgments:

(i) State of Karnataka v. Mapilla P.P.Soopi, AIR 2004 SC 85.

(ii) State of Rajasthan v. Kishanlal, AIR 2002 SC 2250.

(iii) Surjan and others v. State of M.P., AIR 2002 SC 476.

(iv) Anmol s/o. Shridhar Gharde and others v. The State of Maharashtra, 1999 Cri.LJ 4239.

(v) State of Punjab v. Gurmit Singh and others, AIR 1996 SC 1393.

(vi) State of Maharashtra v.Vasant Madhav Devre, 1989 Cri.L.J. 2004.

5. Per contra, Mr. K.T. Dave, learned Additional Public Prosecutor for the respondent – State of Gujarat, has feebly contended that there

is evidence on record that the accused being a police constable, misused the position and has developed relation with the family of the victim and under the guise of family relation, he allured the prosecutrix and took her with him at various places and put her in such a precarious position that she had no option but to surrender to the accused and, therefore, the impugned judgment and order passed by the trial court is based on the evidence on record which does not call for interference of this court in this appeal and since the appeal lacks merit, it deserves to be dismissed. He, therefore, urged to dismiss the appeal.

6. This Court has considered the submissions advanced by the learned advocates for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read

and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with criminal cases, this Court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial court has rightly recorded the order of conviction and sentence.

7. To prove the case against the accused, the prosecution has, as observed earlier, examined as many as seven witnesses and produced 14 documents. However, according to this Court, only evidence which is relevant for deciding whether the accused is guilty of the offence alleged against him would be that of P.W.4, Dinaben – the prosecutrix and P.W.5, Mansukhbhai

– husband of the prosecutrix. Therefore, it would be advantageous to elaborately discuss their evidence only in this judgment.

8. Firstly, adverting to the evidence of P.W.4, Dinaben Mansukhbhai Parmar, the prosecutrix, Ex.15, at page 37, it is seen that at the relevant time, in the year 1993, she was staying at Rajkot. She has deposed that the accused was serving in Lodhvad Police Station. She and her husband had a quarrel with each other and in that quarrel her husband got burn injuries and in that regard a case was filed against her and in connection with the said case, the accused used to summon her and thus intimacy between the accused and her developed. Her husband had also developed relation with the wife of the accused and he treated her as his sister. Similarly the accused had developed relation with her as brother and there was relation between both the families and they used to tie 'rakhi' in the

festival of Rakshabandhan. She has also testified that the account of her husband was maintained by the accused. She has also testified that the accused had allured her and told her that she would get peace in life if she stays with him. She has also testified that the accused had taken her to guest house. She has testified that there was outstanding due of Rs.70,000 from the accused in connection with the account maintained by him of the business of her husband. She has also testified that the accused had written letters to her under his signature which are on record at Ex.16 and 17. It is also testified by her that a complaint against a member of SC was filed by her. She has also filed a complaint against her father in law and mother in law. Similarly, she had also filed a complaint against her landlord in connection with a dispute pertaining to water and, therefore, she consumed some poisonous drug. Her landlord has also filed a complaint against her husband as well as her son. She has testified that she had a talk with her

husband that the accused allured her to go with him and on his allurement she always used to go with him. It is also her case that the accused was minded to keep her in his house and wanted to separate her from her husband. In paragraph 25 of her cross-examination, she has denied the suggestion that she had in her statement before the police stated that she had physical relations with the accused willingly. She has also denied the suggestion that she had in her statement before the police stated that the accused had not used force or given threat.

8.1. It may be noted that this is an improved version of the prosecutrix in her cross-exhumation. The said contradiction has been proved by the evidence of the investigating officer and, therefore, it is clear that in her police statement she has stated that on her own will she allowed the accused to have sexual intercourse with her. Similarly, she has also

stated that the accused has not used force nor gave threat to her.

8.2. The matter did not rest there. She has also admitted that a bottle of medicine 'prajna' was recovered from her. She has also admitted that she had stayed one night with the accused in a guest house at Rajkot. She has also admitted that on the next day of the said incident she was beaten by her husband. This is the sum and substance of the evidence of the prosecutrix.

9. Now we shall refer to the evidence of P.W.5, Mansukhbhai, Ex.19, page 58 of the paper book. He is the husband of the prosecutrix. He has, inter alia, testified similar version which has been deposed by P.W.4, Dinaben, with regard to the relations they had with the accused and according to him, their relations were cordial. He has also testified that her wife - prosecutrix has admitted before him that the accused used to

add stupefying substance in snacks as well as cold drinks. He has also shown the capsules containing the stupefying substance. He has also testified that he had consulted 3-4 lawyers of Rajkot. He has also admitted that his wife – prosecutrix and the accused stayed in a hotel at Rajkot during night hours by giving fictitious names. This is the sum and substance of the evidence of P.W.5, Mansukhbhai, the husband of the prosecutrix.

10. On re-appreciation, re-evaluation, re-analysis and a threadbare close scrutiny of the evidence on record and on perusal of the testimonies of P.W.4 and P.W.5 and other witnesses as well as other documents on record, according to us, the story narrated by the prosecutrix that the accused having committed rape on her on various occasions from the year 1991 till the year 1993, does not inspire confidence on following grounds:

(a) The prosecutrix, though denied in her evidence to have given police statement to the effect that she had sexual intercourse with the accused by her consent and also that there was no threat administered by the accused upon her, the said fact is proved by the deposition of the investigating officer, who has categorically stated in the cross-examination that the prosecutrix Dinaben has stated before the police that she has voluntarily allowed the accused to have sexual intercourse with her. The police officer has also admitted that the prosecutrix has stated before the police that at that point of time neither any force was applied nor was any threat administered to her.

(b) When the prosecutrix has alleged that under the effect of intoxication on account of some stupefying drug being administered in the food or the cold drink by the accused that she was losing

her control over her body and the accused used to commit rape upon her, if the relations went on for two years, the repetition of administration or mixing up of such drug either in the food stuff or in the cold drink is just not possible as the prosecutrix would never allow the accused to do any such act with a view to take any undue advantage of the situation, from the very second time.

(c) The prosecutrix has gone to Jamnagar and she had come back at night to Rajkot and thereafter she had been in the company of the accused in a guest house where it is alleged that the rape was committed. However, her sister-in-law, Shardaben, when disclosed to the husband of the prosecutrix that she had come to Rajkot at the earlier night and the prosecutrix has not disclosed the said fact but on the contrary she disclosed the fact that only in the next day morning she had come from Jamnagar, and having come to know that the

prosecutrix had spoken lie to her husband, her husband has beaten her and only thereupon she had disclosed that she had been in the company of the accused on the earlier night. This conduct of the prosecutrix eloquently speaks of her consent to any such alleged illicit relation if at all the accused had with the prosecutrix.

(d) Having regard to the relation between two families of tying Rakhi by the prosecutrix to the accused and by accused's wife to the husband of the prosecutrix, it clearly shows that there were thick social and family relations between two families. Not only that it has come on record that the accused used to help the husband of the prosecutrix in his business. If this is the story disclosed by the prosecutrix herself, there would not be any question of the accused having over powered her and administered some stupefying drugs and committed rape upon her which went on for two years.

(e) The drug in question which is an Ayurvedic Veterinary medicine is admittedly recovered from the prosecutrix herself. The nature of the drug and its effect is not specifically coming on record. The details about the contents of the drug and the ingredients thereof with any specific analysis are not coming on record. Therefore, the very theory of administration of stupefying drug in the food or in the cold drink and under the intoxicant effect of the same that the accused was taking disadvantage is neither proved nor is found probable in the facts of the case.

11. Besides the above referred to deductions, there are circumstantial evidence to show that the prosecutrix was a consenting party to the sexual intercourse the accused allegedly had with her. It has also come in the evidence of the prosecutrix that with the help of her husband,

after taking advice of 3-4 advocates, she has filed a private complaint in the court after lapse of more than two years from the alleged relation of sexual intercourse started between the prosecutrix and the accused. Even after the last incident of sexual intercourse stated to have taken place on 17.9.1993 after which the prosecutrix had already had intercourse with her husband on 3 to 4 occasions and that the complaint came to be filed on 29.10.1993. The medical officer who recorded the history of the prosecutrix has stated that the last intercourse the accused had with the prosecutrix on 24.10.1993 and thereafter she had physical relationship with her husband on 3 to 4 occasions. These facts go to show that though the prosecutrix wanted to allege against the accused that the accused had committed sexual intercourse with her on number of occasions, she has come to know about this only recently and when her husband doubted her, she disclosed this fact to her husband. These facts on record clearly

indicate that not only she has lodged a complaint after lapse of more than two years and that too without giving any explanation as to why the complaint before the police was not filed and also with a created and concocted story of administration of stupefying drug which in fact was found from her own possession.

12. It may be appreciated that the trial court has rightly believed that none of the ingredients of kidnapping are satisfied and no offence under Section 366 is proved against the accused but the trial court has committed a very serious error of law in imposing the conviction on the accused under section 376 (2) IPC as, in instant case, none of the ingredients of section 376 (2) IPC are satisfied. The accused being a police constable at the relevant point of time is only an incidental fact which had absolutely no bearing on the act alleged against him. On the contrary, evidence has come on record that the

relations between the two families were socially very thick and they had on number of occasions gone to the house of each other and even tied 'rakhi', there is no evidence on record to point out that the accused had either misused his position as police constable in committing the alleged crime. When the offence of Section 376 IPC itself is not proved, there would not be any question of applying sub-section (2) of section 376 IPC in absence of any evidence that the accused had taken any advantage of his post or has influenced the prosecutrix upon the fact that the accused was a police constable. The findings in this regard given by the trial court are absolutely perverse and contrary to the facts and circumstances and also against the evidence on record.

13. At this stage, it would be appropriate to mention the character and conduct of the prosecutrix. There is evidence on record that the

prosecutrix used to pick up quarrel with her husband and on one occasion she had thrown a burning stuff on her husband as a result of which he got burn injuries and was hospitalized for 3 days. Her husband has also filed a police complaint against her in this regard. There is also evidence on record that at Jamnagar the prosecutrix has filed a criminal complaint against a member of a Scheduled Caste. It has also come on record that she has filed complaint against her parents-in-law. She had a dispute and a scuffle with her landlord and she had consumed some poisonous substance and evidence in this regard is also there on record. It has also come on recored that when the prosecutrix tried to conceal the fact of she having come to Rajkot from Jamnagar on the earlier night and spent the whole night with the accused, her husband having come to know had beaten her and only thereafter she had disclosed the real fact to her husband. Further, the conduct of the prosecutrix of keeping the drugs with her in a cloth bag and the

same having been found subsequently by her husband, clearly indicates of her intention of keeping such drug with her. She has also written certain letters under her signature and also some with the joint signatures of the accused and herself and has stated in her deposition that in such letters no threat is administered by the accused.

14. The evidence of Indrajit Labhshankar, Ex.21, page 64 of the paper book, who is a Clerk in Shreyas Guest House, indicates that two persons of opposite sex had come to the guest house and had gone on the next day morning.

15. From the above, it is clear that there was no protest at any point of time made by the prosecutrix either at the guest house or while going to the guest house in the rickshaw or at the time when the food articles were ordered and were brought in the room of the guest house and,

therefore, eloquently, upon her own conduct, she is found to be a consenting party to whatever act which is alleged against the accused.

16. In the case of State of Karnataka v. Mapilla P.P. Soopi (supra), the Supreme court has observed that the evidence on record indicates that the victim raised alarm only after the accused went away from her house. No injuries were found on her body to indicate any forceful assault on her. Further, undue delay in lodging complaint without acceptable evidence has also contributed to doubt the prosecution case. Thus it was held that the prosecution has failed to establish case against the accused and hence the Supreme Court did not interfere in the said appeal.

17. In the case of State of Rajasthan v. Kishanlal, (supra), the Supreme Court has observed that the prosecutrix did not raise alarm

on being told by the accused that he had come to have sexual intercourse. The plea that prosecutrix was threatened with knife was belied by non-recovery of knife from the accused. The statement by prosecutrix that the accused had offered her Rs.20/- for the act shows intimacy between the parties. The conduct of husband of the prosecutrix was unnatural as he first asked the prosecutrix if she has called the accused and only then caught the accused. In these circumstances, the probabilities of the fact show that sexual intercourse was by consent and held that the accused was liable to be acquitted.

18. In the case of Surjan and others v. State of MP,(supra), the Supreme Court has discussed as to the evidentiary value of the solitary testimony of prosecutrix in a rape case. It can be relied on only when it inspires confidence. Allegation that a prosecutrix was raped by six persons and the incident was not disclosed to any

one by the prosecutrix for two-three days. Delay of ten days in lodging FIR remained unexplained. The report of medical examination was not brought on record. Under the circumstances, uncorroborated testimony of the prosecutrix could not be relied on and held that the conviction is liable to be set aside.

19. In the case of Anmol s/o. Shridhar Gharde and others v. The State of Maharashtra (supra), the Bombay High Court (at Nagpur) has observed that unchallenged evidence of friend of prosecutrix shows that the prosecutrix was having a love affair with the accused, therefore, the possibility of false implication cannot be ruled out. In such a circumstance, conviction cannot be based on testimony of prosecutrix alone without any corroboration and the accused is entitled to acquittal.

20. In the case of State of Punjab v. Gurmit

Singh and others (supra), the Supreme Court has discussed about the evidentiary value of the testimonies of the prosecutrix and also highlighted when corroboration is necessary.

21. In the case of State of Maharashtra v. Vasant Madhav Devra (supra), the Bombay High Court has observed that the prosecutrix living in vicinity of police station and was acquainted with the accused, a police constable. The police constable alleged to have entered her house during night time in the absence her husband and had forcible sexual intercourse with her. Probability of the prosecutrix who was alone in her hut, her husband being out for night watchman duty, having consented to sexual intercourse with the constable could not be ruled out. In these circumstances, benefit of doubt must go to the accused and the acquittal could not be interfered with.

22. In the case of State of Maharashtra v. Abdul Hafiz Faroki and others, AIR 1998 SC, 2382, the Supreme Court was concerned with the alleged rape by eight persons and that too twice and that the accused had pushed prosecutrix out of running train after giving kicks. In paragraph 4 of the said judgment, the Supreme Court has observed as under:

> “4. We have carefully gone through the evidence of PW 1, Rukmani and PW 2, Kesarbai. Judging it on the ground of probability, their version that 8 persons had committed rape on Kesarbai and that too twice does not appear to be correct. In the first information report given by PW 1, Rukmani her version was that Kesarbai was taken into the latrine of the compartment and therein the accused had committed rape on her. In her evidence before the Court she changed her version and she and Kesarbai both stated that rape was committed on her not inside

the latrine but inside the compartment on the floor in between two berths. Kesarbai at the time of the incident was aged 20 years. The evidence shows that she was not carrying on well with her parents and she had left Village Kekatumra with her aunt Rukmani two days before the date of the incident. They did not have money to purchase tickets and, therefore, they were travelling without tickets. That was the reason why they had to get down at Akola Railway Station and stay there for the whole day. They had boarded the train at Akola for going to Wardha at 12 midnight without purchasing tickets possibly believing that they will not be caught at night. However, the Ticket Checker caught them and, therefore, they were required to get down at Pulgaon. They stayed at Pulgaon for the whole day and boarded the train for going to Chandrapur at 9.00 p.m. Neither PW 1, Rukmani nor PW 2, Kesarbai have stated

why they wanted to go to Chandrapur. Neither Kesarbai nor her aunt had more than three rupees when they left Village Kekatumra. According to the evidence of PW 1, Rukmani after the accused had committed rape on Kesarbai they had pushed her giving kicks upto the door of the compartment and then had thrown her out of the compartment when the train was passing through the Wardha Railway Yard and was only a short distance away from the Station. Kesarbai has also stated that she was pushed out of the running train. If really 8 persons committed rape on Kesarbai and that too twice and had pushed her out of the running train after giving kicks then some injuries would have been found on her person. But except for a small incised wound on her right hand and some minor superficial abrasions no other injury was found on her person. If Kesarbai was really thrown out of the train while it was passing through the

Railway Yard and was taken forcibly by A-1 and A-2 to the nearby hillock then she would have raised some shouts. But that is not her evidence. That appears to be the reason why the High Court held that possibly Kesarbai had gone with A-1 and A-2 willingly and with an ulterior motive both of them had falsely involved the accused. Considering the infirmities in the prosecution evidence, it cannot be said that the view taken by the High Court is unreasonable and calls for any interference by this Court".

23. In the case of Ram Nivas v. State of Karnataka, 1994 SCC (Cri.) 503, the prosecution case mainly rested on the evidence of the prosecutrix. As per the evidence, spermatozoa was absent. No injuries were found on the prosecutrix or on the accused suggesting forcible intercourse. The prosecutrix being a grown up married woman, the doctor was unable to give any opinion whether rape had been committed or not.

The evidence of the prosecutrix was found to be highly untrustworthy. In these circumstances, it was held that the accused were entitled to the benefit of doubt.

24. Applying the principles laid down by the Supreme Court in the above referred to judgments to the facts of the present case and on close scrutiny of the evidence on record, it has to be held that the evidence of the prosecutrix is not of sterling quality. She was a consenting party to the sexual intercourse with the accused. She has moved with the accused from place to place and that too for a period of two years. She herself was keeping the stupefying medicine with her to provoke or enhance sex. She has filed a number of cases against many persons and against her also a number of cases have been filed and hence it is clear that the past of the prosecutrix was shabby. Therefore it has to be ruled that she was a consenting party to the sexual intercourse that the accused had with her.

25. Seen in the above context, we find that the prosecution has failed to prove the charge framed against the accused for commission of offence under Section 376 IPC beyond reasonable doubt and, therefore, the impugned judgment and order passed by the trial court is required to be quashed and set aside and the accused deserves to be acquitted of the offence with which he was charged and the appeal deserves to be allowed.

26. For the foregoing reasons, the appeal succeeds and accordingly it is allowed. The impugned judgment and order dated 7.12.1999 passed by the Additional Sessions Judge, Rajkot District, Rajkot in Sessions Case No.143 of 1994, convicting and sentencing the accused for commission of the offence punishable under Section 376 (2) and 506 (2)IPC is quashed and set aside and resultantly the accused is acquitted of the offences with which he was charged.

26.1. The accused is on bail. Therefore, his bail bonds shall stand cancelled and surety is

discharged.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

(karan) ...